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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 398.

HORSMAN DOLLS, INC., a corporation of New Jersey,
Petitioner,

v.

UNEMPLOYMENT COMPENSATION COMMISSION OF NEW JERSEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

REPLY BRIEF OF PETITIONER.

SAMUEL KAUFMAN,
Counsel for Petitioner,
60 Park Place,
Newark, New Jersey.

NATHAN BILDER,
SANFORD FREEDMAN,
JOHN M. KAUFMAN,
On the Brief.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.

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On Petition for a Writ of Certiorari to the Supreme Court of New Jersey.

REPLY BRIEF FOR PETITIONER.

Respondent's statement that the jurisdictional statement of the petitioner does not appear to conform to requirements of the third paragraph of Rule 12 (1) is in error.

As noted in the petition, there has already been filed with this Court and allowed by the Court an appeal from the judgment of the Supreme Court of New Jersey. With that appeal there was filed the jurisdictional statement required by Rule 12. Petitioner was informed by the Clerk of this Court that its petition for a writ of certiorari would

be docketed in the appeal and that another statement of jurisdiction repeating the same facts was unnecessary under the circumstances. In any event, however, the matters required to be contained in a statement of jurisdiction do appear in the petition beginning with the section entitled "Summary Statement of the Matters Involved."

A.

Estoppel and Laches.

It is argued by the respondent that there was no substantial federal question involved because the decision of the Supreme Court of New Jersey is based upon non-federal grounds which are adequate to support the judgment. Respondent contends that included in these grounds are the doctrines of estoppel and laches.

In its brief in support of the petition for writ of certiorari (page 14), the petitioner pointed out that the argument of estoppel was predicated upon the fact that the petitioner did not respond to the Form B-11 which the Commission sent to most recent employers when a claim for benefits was filed. It was pointed out by the petitioner, as the majority of the Court below indicated in the opinion, that this form was "extra the statute". Petitioner met this argument in its main brief by showing that most of the disqualifying reasons provided by the statute were not within the petitioner's knowledge as a former employer of the claimant. By the very terms of the Form B-11 petitioner was not obligated to complete the form and return it to the Commission. In addition, the petitioner's records

disclosed no reason to disqualify the claimants who were its former employees. This was further support for its treatment of the B-11 as the simple inquiry which it was. What the Commission has done, with the apparent approval of the majority below, is to predicate the eligibility of the claimant for benefits upon the fact that the petitioner did not return the Form B-11 and upon this fact alone, for there is no proof in the record of any decision being made by the Deputy in any case where a claim for benefits was filed. This point is adequately demonstrated in the minority opinion.

The B-11 contained no warning that failure to answer would result in petitioner's not receiving the statutory notice of decision with right of appeal thereon. Loss of constitutional rights cannot be sanctioned by such a trap.

B.

Harm and Injury.

It is said by the respondent that the benefits paid to the petitioner's former employees "were justified on the merits" (Respondent's brief, page 12). There is no proof in the record to support this statement. There is no proof that the claimants were eligible for benefits or that they were not disqualified from receiving benefits within the statutory provisions previously discussed (Main brief, page 10). No proof of any decision made by the Deputy establishing the validity of the claim for benefits charged against the petitioner's account was ever produced, although repeated requests therefor were made by the petitioner during the course of the hearings before the Commission. The

payment of the benefits to the claimants completely foreclosed under the statute any opportunity to the employer to ascertain in an adversary proceeding whether or not the claimants did and could sustain the burden of establishing their right to benefits. In our main brief we pointed to the cases which hold that where due process is denied, there is sufficient harm to justify the reversal of state action.

C.

The Exhaustion of Administrative Remedies.

The doctrine which bars an appeal to the courts for failure to exhaust administrative remedies is directed to the case where the highest unit of an agency having jurisdiction has had no opportunity to pass upon the issues. *Myers* v. *Bethlehem Steel Corp.*, 303 U. S. 41 (1938). In the instant case the decision was made by the Unemployment Compensation Commission itself, from which there is no appeal except to the courts. The attack upon the contribution rate imposed by the Commission against the petitioner was made upon the very form supplied by the Commission for the purpose. It was the Commission which directed that the case before it be tried before one of its referees (R12a). It was the Commission which, at the close of the hearing before the Referee, withdrew the case from the Referee to itself for decision (R13a). The New Jersey Court of Errors and Appeals, which sustained the action of the Commission in another phase of this case, specifically held that the determination of whether there should be an adjustment or refund to the petitioner in this case was a matter

which was exclusively vested in the Commission or its executive director. *Horsman Dolls, Inc.* v. *Unemployment Compensation Commission,* 134 N. J. L. 77 at 79 (E. & A., 1946).

The asserted non-federal grounds by which the respondent seeks to prevent a hearing upon the substantial constitutional issues are illusory and inadequate. The failure of the petitioner to answer a form used by the Commission for which there is no statutory warrant and which, according to its terms, did not require an answer from the petitioner, is now asserted by the respondent as a basis for denying notice and hearing. The petitioner's submission to a hearing before the Commission upon the Commission's own form of pleadings, and the Commission's own action in deciding the case now before this Court is asserted by the respondent Commission as a failure to exhaust administrative remedies. This procedure which the Commission adopted and which it directed the petitioner to follow received the approval of the New Jersey Court of Errors and Appeals. Nevertheless, it is now used by the respondent in an effort to entrap the petitioner in the loss of its constitutional rights.

This Court will not permit such an entrapment to be used as a ground for denying review.

> "It is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support."
>
> *Ward* v. *Love County,* 253 U. S. 17, 22 (1920).

Where the non-federal ground is unsubstantial, this Court will take jurisdiction. *Williams* v. *Kaiser*, 323 U. S. 471 (1945). *Abie State Bank* v. *Bryan*, 282 U. S. 765 (1931).

The denial to the petitioner of a hearing or an opportunity to be heard presents in this case substantial Federal questions over which this Court has jurisdiction and which it is bound to consider.

Respectfully submitted,

Samuel Kaufman

SAMUEL KAUFMAN,
Attorney for Plaintiff-Appellant.

NATHAN BILDER,
SANFORD FREEDMAN,
JOHN M. KAUFMAN,
On the Brief.